Supreme Court, U. S.
FILED
APR 21 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1482

NUNO J. DoCARMO, ADMINISTRATOR OF THE ESTATE OF NUNO J. DoCARMO, JR.,
PETITIONER,

v.

PILGRIM I CORP.,
RESPONDENT.

BRIEF OF RESPONDENT, PILGRIM I CORP., IN OPPOSITION TO PETITION FOR CERTIORARI

LEO F. GLYNN
THOMAS E. CLINTON
ASTRID C. GLYNN
GLYNN & DEMPSEY
One Boston Place
Boston, Massachusetts 02108
Attorneys for Respondent, Pilgrim I Corp.

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented	1
Counter-Statement of the Facts	2
Reason for Denial of the Writ	4
Conclusion	8

TABLE OF CITATIONS

Cases

Ballard v. *Forbes*, 208 F.2d 883 (1st Cir. 1954)	5
Cities Service Oil Company v. *Launey*, 403 F.2d 537 (5th Cir. 1968)	5
Cleveland Tankers v. *Tierney*, 169 F.2d 622 (6th Cir. 1948)	5
Cox v. *Roth*, 348 U.S. 207, 75 S.Ct. 242 (1954)	6
Dixon v. *Serodino, Inc.*, 331 F.2d 668 (6th Cir. 1964)	5
DoCarmo v. *Pilgrim I Corp.*, 612 F.2d 11 (1st Cir. 1980)	7
Dow v. *Carnegie-Illinois Steel Corporation*, 165 F.2d 777 (3rd Cir. 1947)	5
Gardner v. *National Bulk Carriers, Inc.*, 221 F.S. 243 (E.D. Va. 1963)	5
Garrett v. *Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246	6
Grantham v. *Fishing Boat Redwing*, 234 F.S. 89 (E.D. South Carolina 1964)	5
Heuschen v. *Flour Ocean Services, Inc.*, 483 F.2d 1396, 1974 AMC 1773 (5th Cir. 1973)	5
Igneri v. *Cie de Transports Oceaniques*, 323 F.2d 257 (2nd Cir. 1963), cert. denied, 376 U.S. 949 (1964)	5

	Page
International Stevedoring Co. v. *Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926)	6
Ivy v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978), *aff'd on rehearing*, 606 F.2d 524 (5th Cir. 1979) (en banc)	5, 6
Jamison v. *Encarnacion*, 281 U.S. 635, 50 S.Ct. 440 (1930)	6
Michigan Central Railroad Company v. *Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913)	4, 7
Mobil Oil Corp. v. *Higgenbotham*, 436 U.S. 618 (1978)	6
Mpliris v. *Hellenic Lines, Limited*, 323 F.S. 865 (SD Texas 1969), aff'd per curiam 440 F.2d 1163 (5th Cir. 1971)	5
O'Donnell v. *Great Lakes Dredge & Dock Company*, 318 U.S. 36, 63 S.Ct. 488 (1943)	6
Petition of Gulf Oil Corporation, 221 F.S. 1000 (R.I. 1963)	5
Petition of United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970)	5
Sea-land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974)	6
Smith v. *Clark Sherwood Oil Field Contractors*, 457 F.2d 1339 (5th Cir. 1972)	5
United States v. *Smith*, 220 F.2d 548 (5th Cir. 1955)	5
Uravic v. *F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111 (1930)	6
Wade v. *Rogala*, 270 F.2d 280, (3rd Cir. 1959)	5
Warner v. *Goltra*, 293 U.S. 155, 55 S.Ct. 46 (1935)	6
Whitaker v. *Blidberg Rothchild Company, Inc.*, 296 F.2d 554 (4th Cir. 1961)	5

Statutes

	Page
45 U.S.C. Sec. 51	4
46 U.S.C. Sec. 688	4

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1482

NUNO J. DoCARMO, Administrator of
the Estate of Nuno J. DoCarmo, Jr.
PETITIONER,

v.

PILGRIM I CORP.,
RESPONDENT.

BRIEF OF RESPONDENT, PILGRIM I CORP., IN OPPOSITION TO PETITION FOR CERTIORARI

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court review a decision of the First Circuit Court of Appeals affirming a District Court verdict and judgment for the defendant which conformed with clearly established decisional precedents limiting recovery to pecuniary damages in a death action brought under the Jones Act.

COUNTER-STATEMENT OF THE FACTS

The plaintiff's decedent died while employed as a crewmember on the defendant's vessel. The death occurred more than a marine league from shore. Of the various counts in Plaintiff's third amended complaint only the Jones Act count is at issue herein. The verdict of the jury was that the plaintiffs had sustained no damages as a result of the causative negligence of the defendant. The trial court ruled that the plaintiffs would be allowed to recover for any pecuniary loss, including loss of services, but not for emotional non-pecuniary loss.[1]

As a result of the plaintiffs' evidence certain questions of credibility were presented to the jury regarding the claim of pecuniary damages. Plaintiff's evidence was that the decedent was 21 years old, that he had lived with his parents and allegedly paid them some $75.00 per week for his room, board and laundry, that in 1973 he had worked at a gas station financed by his father and his net income from that work was $89.82 per week (out of which he allegedly paid $75.00 per week for the board, room and laundry), that during the four or five months prior to his death in June 1974, the decedent had been unemployed and had no income except for seven weeks of unemployment compensation in the amount of $68.00 per week, that during one of those months (April 1974) the decedent had been incarcerated in the House of Correction, and finally that from the money the decedent earned he

[1]The ruling of the Court admitted testimony by the parents of decedent as to his good character, helpfulness, consideration of others and participation in family activities as well as testimony by the decedent's brother of the decedent's encouragement in sports, school and work.

paid the cost of his own clothing, entertainment, car and vacations. It was further established that at the time of his death decedent had completed only one fishing trip as an apprentice for which trip he received a nominal sum. Plaintiffs nonetheless testified that at all times, including the period decedent was unemployed, he had lived at home and contributed $75.00 a week to the household for his room and board. A police officer testified for purposes of impeachment that in November 1973 he had inquired as to decedent's whereabouts and the decedent's father had told him that he had not seen his son for some time, that decedent was not living at home, and that he believed decedent was somewhere in Florida.

The Court instructed the jury that in its consideration of damages it could consider any material contribution which decedent made to his parents, be that contribution in the direct form of monies or in the indirect form of services, and that it could also consider financial benefits which decedent received from his parents. Apart from this instruction, no instruction was given specifically or impliedly stating that the parents were required to establish their monetary dependency to recover damages. Plaintiff took no exception to the jury instructions except with respect to the failure to charge that emotional non-pecuniary damages were recoverable; the Court did instruct, with no exception taken, concerning the right to recover for pecuniary losses including the value of all services. The jury found that the plaintiffs had not sustained damages, either in monetary loss or any loss of services.

The plaintiffs appealed to the First Circuit Court of Appeals on the issue of the measure of damages under the Jones Act and certain subsidiary issues. The First Circuit Court of

Appeals affirmed the District Court rulings in accordance with the case law which, since the enactment of the Jones Act, has consistently held that damages for emotional loss are not recoverable in a death action brought under the Jones Act.

REASONS FOR DENIAL OF THE WRIT

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE MEASURE OF DAMAGES WHICH CONGRESS PROVIDED IN A JONES ACT DEATH ACTION.

THERE IS NO IMPORTANT FEDERAL QUESTION SINCE CONGRESS HAS FOR SOME SIXTY YEARS INDICATED NO LEGISLATIVE CONCERN WITH THE ESTABLISHED JUDICIAL DECISIONS.

The issue in the case was one of fact, decided by a jury verdict. Well-established precedents of the Supreme Court were applied both by the District Court and the Court of Appeals.

In 1920, Congress enacted the Jones Act, 46 U.S.C. Sec. 688, which created a cause of action which could be brought by certain relatives of a seaman whose death was caused by the negligence of his employer. In the statute creating this cause of action Congress provided that it should be commensurate with the rights of railway workers under the Federal Employer's Liability Act, 45 U.S.C. Sec. 51 (FELA). That cause of action for railway workers had been enacted by Congress 12 years before the Jones Act was passed. Seven years prior to enactment of the Jones Act, and five years after FELA became law, this Court had ruled that survivors' recovery under FELA was limited to pecuniary damages. *Michigan Central Railroad Company* v. *Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). Since the Jones Act enactment in 1920 the Courts have consistently held that when Congress incorporated into the Jones Act the rights of plaintiffs under FELA, Congress intended to and did also incorporate the pre-existing qualification of those rights. Since 1920 the Courts have held that the Jones Act limits damages in a death action to pecuniary damages; Congress has not acted to change this rule.

There is no conflict amont the circuits on this issue. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978), aff'd on rehearing, 606 F.2d 524 (5th Cir. 1979) (en banc). *Hueschen* v. *Fluor Ocean Services, Inc.*, 483 F.2d 1396, 1974 AMC 1773 (5th Cir. 1973). *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970). *Cities Service Oil Company* v. *Launey*, 403 F.2d 537 (5th Cir. 1968). *Smith* v. *Clark Sherwood Oil Field Contractors*, 457 F.2d 1339 (5th Cir. 1972). *Dixon* v. *Serodino, Inc.*, 331 F.2d 668 (6th Cir. 1964). *Whitaker* v. *Blidberg Rothchild Company, Inc.*, 296 F.2d 554 (4th Cir. 1961). *Wade* v. *Rogala*, 270 F.2d 280, (3rd Cir. 1959). *United States* v. *Smith*, 220 F.2d 548 (5th Cir. 1955). *Ballard* v. *Forbes*, 208 F.2d 883 (1st Cir. 1954). *Cleveland Tankers* v. *Tierney*, 169 F.2d 622 (6th Cir. 1948). *Dow* v. *Carnegie-Illinois Steel Corporation*, 165 F.2d 777 (3rd Cir. 1947). *Igneri* v. *Cie de Transports Oceaniques*, 323 F.2d 257 (2nd Cir. 1963), cert. denied, 376 U.S. 949 (1964).

Nor is there conflict among the district courts on this issue. *Mpliris* v. *Hellenic Lines, Limited*, 323 F.S. 865 (SD Texas 1969), aff'd per curiam 440 F.2d 1163 (5th Cir. 1971). *Gardner* v. *National Bulk Carriers, Inc.*, 221 F.S. 243 (E.D. Va. 1963). *Grantham* v. *Fishing Boat Redwing*, 234 F.S. 89 (E.D. South Carolina 1964). *Petition of Gulf Oil Corporation*, 221 F.S. 1000 (R.I. 1963).

The occasions which the Petitioner has pointed to as illustrating a liberal interpretation of the Jones Act do not justify the result which Petitioner herein seeks. Those cases involved principles or facts not native to FELA and its pre-existing FELA case law and therefore not incorporated into

the Jones Act with FELA. For example, *International Stevedoring Co.*, v. *Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926) and *Warner* v. *Goltra*, 293 U.S. 155, 55 S.Ct. 46 (1935) and *Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111 (1930) went to the issue of who is a seaman. None of the cases cited by Petitioner purport to contradict a clear rule of FELA and many of the cases expressly affirm that FELA principles are incorporated in the Jones Act and are to be regarded as statutory directives. *Cox* v. *Roth*, 348 U.S. 207, 75 S.Ct. 242 (1954); *Uravic* v. *Jarka Co.*, 282 U.S. 234, 51 S.CT. 111 (1930); *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S.Ct. 440 (1930); *Garrett* v. *Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246; *O'Donnell* v. *Great Lakes Dredge & Dock Company*, 318 U.S. 36, 63 S.Ct. 488 (1943). Those cases which Petitioner cites for the liberality of the Jones Act do not contort that liberality into a denial of these directly applicable principles of FELA which Congress incorporated into the statutory scheme.

This court has consistently recognized that while the Jones Act may be a remedial statute, it is a statute. The remedies it gives are prescribed by Congress and Congress, both in 1920 and by its continued silence since then, has declared that only pecuniary damages are available in a Jones Act death action. There is no occasion for this Honorable Court to rewrite the will of Congress and disavow 60 years of judicial respect for that will.

The Fifth and First Circuits, the only two circuits to consider the definition of damages in a death action brought under the Jones Act since the decisions of this Court in *Sea-land Services, Inc.* vs. *Gaudet*, 414 U.S. 573 (1974) and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), have both concurred that the statutory construction which Congress has left unchanged since 1920 remains valid and proper. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) aff'd

on rehearing, 606 F.2d 524 (5th Cir. 1979) (en banc); *DoCarmo* v. *Pilgrim I Corp.*, 612 F.2d 11 (1st Cir. 1980).

Both circuits uniformly rejected the radical possibility urged by the Petitioner that the measure of damages which was uniquely adopted in *Gaudet* for the General Maritime Law remedy of *Moragne* should be applied to the statutory remedy of the Jones Act. Those Circuits plainly affirmed that an exception cannot become the rule and that a desire for uniformity cannot be used to counter an established statutory rule of law in which the Courts and Congress have for so long concurred.[2]

The consensus among the courts is not untoward. The rights of claimants under the Jones Act were created by and defined by statute. Since 1920 it has been held that when Congress incorporated into the Jones Act the rights of railway workers under FELA, Congress also incorporated the limiting construction of those rights which had been declared by this Court seven years previously in *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). In the 60

[2]The measure of damages permitted in a Jones Act death action is uniform with the available damages under DOSHA. The state wrongful death statutes are not uniform in the measure of damages allowed. Any attempt to vary a Federal statutory remedy to accord with state remedies would result in a continuous chase after a standard subject to alteration by any of 50 state legislatures. Moreover, any contention that uniformity demands equal damages under the Jones Act and any given state statute is further contradicted by the different standards for liability imposed by the state statutes and the Jones Act. For example, the Massachusetts statute to which Petitioner has referred requires a finding that the defendant's acts were "willful, wanton or reckless" for most actions. Arguably if the measure of damages for the Jones Act were to be changed to accord with the local state standard then the liability out of which those damages arose should also be reduced to accord with the state provisions. This would result in the federal statute being preempted by the individual state statutes. Clearly this would not only do violence to uniformity but was not the intent of Congress in passing the Jones Act.

years since the Jones Act was passed, Congress has failed to change in any respect whatsoever that restriction on the extent of recoverable damages. As the First Circuit Court of Appeals correctly noted in its opinion, ". . . arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress." (612 F.2d 11 at 13). The Petitioner's complaints as to the wisdom of the existing statute are not properly addressed to this Court.

CONCLUSION

There being no controversy among the Courts as to the measure of damages which Congress provided in the Jones Act and there being no Congressional declaration to the contrary, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEO F. GLYNN, ESQ.
THOMAS E. CLINTON, ESQ.
ASTRID C. GLYNN, ESQ.
GLYNN & DEMPSEY
One Boston Place
Boston, Massachusetts 02108
Attorneys for Respondent,
Pilgrim I Corp.